

RICHLAND COUNTY WATER RESOURCE DISTRICT
Richland County Courthouse, Wahpeton, ND
August 18, 2020

The Richland County Water Resource Board ("RCWRB") met August 18, 2020 at 8:00 AM at the Richland County Courthouse.

THOSE PRESENT: Managers Arv Burvee, Mark Fahsholz, Gary Friskop, James Haugen, Don Moffet, Engineering Technician Justin Johnson, and Secretary-Treasurer Monica Zentgraf.

THOSE ABSENT: None

Approval of Agenda

A motion was made by Mgr. Moffet, seconded by Mgr. Burvee, and unanimously carried to approve the order of the agenda as presented.

Minutes

The August 11, 2020 minutes were presented. A motion was made by Mgr. Haugen, seconded by Mgr. Burvee, and unanimously carried to approve the August 11, 2020 minutes as presented.

Mail

- 1) Richland County Commission- Minutes of the July 2020 meetings.

Applications

Application to Install a Subsurface Water Management System No. 20-032 for Klosterman Farms, in the NW1/4 Section 10, Barney Township

The District reviewed an *Application to Install a Subsurface Water Management System No. 20-32*, dated June 17, 2020, and filed July 13, 2020, for Klosterman Farms. Under the application, Applicant seeks to install a 150-acre drain tile system in the NW1/4 Section 10, Barney Township, Richland County, North Dakota. The project will include a single pump outlet located in the SECR NW1/4 Section 10; the outlet will discharge into the north road ditch along ND Highway 13 and will flow east, along the south boundary of the NE1/4 Section 10, for approximately one-half mile until discharging into Richland County Drain No. 95, a legal assessment drain owned by the Richland County Water Resource District.

The Board previously provided a THIRTY-DAY NOTICE to the North Dakota Department of Transportation ("NDDOT") as a downstream landowners, as required under N.D. Cent. Code § 61-32-03.1. The owner of the NE1/4 Section 10 provided an executed "Notarized Letter of Approval." NDDOT did not submit any "technical evidence" to object to the project; with that in mind, the Board cannot require Applicant to obtain NDDOT consent as a condition to the permit. However, NDDOT will require Applicant to obtain a "Request for Drainage on Highway Right of Way" under NDDOT's authorities, regarding the discharge into Highway 13 right of way. Further, the District can require Applicant to install and maintain erosion protection at the outlet into NDDOT's road ditch, to protect the ditch.

According to records supplied by Applicant, Robert M. Klosterman, as Trustee of the Robert M. Klosterman Revocable Trust, owns the NW1/4 Section 10, Barney Township; the Trust executed the Application to provide the requisite consent to the project. With regard to downstream properties, in addition to NDDOT's Highway 13 right of way, Minn-Kota Ag Products, Inc., owns the NE1/4 Section 10.

Mgr. Burvee moved, and Mgr. Fahsholz seconded the motion, to approve *Application to Install a Subsurface Water Management System No. 20-032*, dated June 17, 2020, and filed July 13, 2020, for Klosterman Farms, regarding a proposed tile system in the NW1/4 Section 10, Barney Township,

and to authorize the Secretary-Treasurer to sign SUBSURFACE WATER MANAGEMENT PERMIT NO. 20-032, subject to the following conditions:

- 1) That Applicant notify the Richland County Water Resource District in advance of any proposed alterations to outlet locations, or addition of any outlets;
- 2) That Applicant provide, install, and maintain riprap or other ditch stabilization materials satisfactory to the NDDOT at any and all outlets into NDDOT's highway right of way; and
- 3) That Applicant must turn off any pump outlets and otherwise close all outlets during "critical flood periods," as determined by the Richland County Water Resource District.

Upon roll call vote, the motion carried unanimously.

Under Section 61-32-03.1, the Board cannot attach any additional conditions to Applicant's permit. However, for Applicant's protection, and to ensure protection of Applicant's tile system, the Board will recommend that Applicant comply with the following:

- 1) That Applicant notify the Richland County Water Resource District in advance of any proposed improvements to the tile system, or any proposed increase in the capacity or drainage area of the tile system and, if necessary, submitting an additional permit application;
- 2) That Applicant obtain permission from the NDDOT to discharge into, or otherwise utilize, any of NDDOT's highway right of way; and
- 3) That Applicant obtain all other necessary and requisite licenses, permits, registrations, and/or approvals from all applicable federal, state, county, and municipal governments, and any other applicable governmental entities.

Drain Appl #20-042, Allen Ward: E1/2SE1/4 Section 20, Mooreton Township- The RCWRB acknowledged the application for drain tile was filed for notification purposes only. No State Subsurface Permit is required and no action is required by the RCWRB as the project involves less than 80 acres.

Proj #72

Secretary-Treasurer Zentgraf reported three applications for the Drain #72 assessment district need to be discussed by the Board today. Under Appl #20-009, the District identified erosion damage in the NW1/4 Section 12 and the SW1/4 Section 1, Abercrombie West Township. Under Appl #20-026, the District identified a culvert replacement in the NW1/4 Section 7, Abercrombie West Township; erosion repairs in the SW1/4 Section 1, Nansen Township; a culvert repair in the NE1/4 Section 34, Colfax West Township; erosion repair in the NW1/4 Section 2, Nansen Township; erosion repairs in Section 1, Nansen Township; a culvert replacement in the SW1/4 Section 14, Nansen Township; and two culvert replacements in the SE1/4 Section 14, Nansen Township. Under Appl #20-043, the landowner requested the replacement of a culvert in the SW1/4 Section 13, Nansen Township, with a longer culvert.

Before the Board proceeded with any substantive discussion regarding these applications, Mgr. Fahsholz indicated he may have a conflict in light of his ownership of property within the Drain #72 assessment district. More specifically, Mgr. Fahsholz owns the SW1/4 Section 32, Colfax West. The Board's attorney, Sean Fredricks, previously indicated the Board is required by law to conduct a conflict analysis in these situations.

The law in North Dakota regarding conflicts, Section 44-04-22 of the North Dakota Century Code, provides the relevant standard. That statute provides:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

The North Dakota Supreme Court and the Attorney General's Office have taken narrow views of situations where a public official can abstain from participating in a matter. A public official must have a "direct and substantial personal or pecuniary interest" in the matter. The mere appearance of a conflict is not enough to allow the public official to refrain from participating, and a public official cannot unilaterally decide not to participate or to abstain from voting. The North Dakota Supreme Court adopted a "rule of necessity" that requires public officials to participate in matters before their respective boards. The public policy rationale is that public officials have a duty to vote on issues before them, and cannot avoid participation simply to avoid the appearance of impropriety. In other words, just the possibility that a Manager has some type of interest in a matter does not automatically afford that Manager the ability to abstain from any votes on the matter; rather, the Board must first conduct the requisite conflict analysis.

The Section 44-04-22 test requires a multi-step analysis. With regard to Mgr. Fahsholz's potential conflict, the question is whether or not the property he owns in the Drain #72 district creates a conflict. Under Section 44-04-22, the question is if the situation creates a "direct and substantial personal ... interest" conflict under Section 44-04-22. None of these culvert or erosion repairs will have any impact directly on Mgr. Fahsholz's property. However, Mr. Fredricks previously indicated the North Dakota Supreme Court has held that a Manager's ownership or interest in real property within a drain assessment district qualifies as a technical conflict since the interest creates a "direct and substantial personal ... interest" regarding the property and the assessment district.

However, the existence of a technical conflict does not conclude the conflict analysis. The Board must next decide if the conflict should preclude Mgr. Fahsholz's participation in these matters or votes regarding any of the applications.

In each of these situations, none of the requested repairs or culvert replacements will result in new assessments to Mgr. Fahsholz's property; the Board would fund each with the Drain #72 maintenance district, and the maintenance levy for Drain #72 will not vary depending upon these projects. Further, Mgr. Fahsholz has more personal knowledge of the area, more familiarity with the issues with Drain #72, and an understanding of the benefits each of these repairs or culvert replacements may provide to the various properties in the Drain #72 assessment district. In light of Mgr. Fahsholz's knowledge of the watershed, Mgr. Haugen moved to declare that Mgr. Fahsholz does have a conflict in the matter under Section 44-04-22, but to require Mgr. Fahsholz to participate in discussions regarding each of these applications, and to vote on all the applications. Mgr. Burvee seconded the motion. Upon roll call vote, the following Managers voted in favor of the motion: Burvee, Moffet, Haugen, and Friskop. Mgr. Fahsholz abstained. The motion passed.

With the conflict issues concluded, the Board proceeded with discussion regarding the applications.

Drain Appl #20-043, Blaine Kummer: SW1/4 Section 13, Nansen Township Request to replace an 18 inch culvert with a 24 inch culvert and to lengthen it.

Mr. Johnson reported a flap gate is broken off an inlet culvert in the SE1/4 Section 13 also. Discussion was held regarding the Applicant's request to widen the approach. A motion was made by Mgr. Burvee and seconded by Mgr. Fahsholz to replace the 18 inch culvert in the SW1/4 Section 13, Nansen Township, with a 24 inch culvert and flap gate (culvert length to be determined by Mr. Johnson), and to approve a new flap gate for the 18 inch culvert located in the SE1/4 Section 13, Nansen Township. Work assigned to JBX. Upon roll call vote, the following Managers voted in favor of the motion: Fahsholz, Burvee, and Friskop. Mgrs. Moffet and Haugen voted against the motion. The motion carried.

Technician's Report

Mr. Johnson provided the following reports:

- **Proj #63**

Mike Bassingthwaite, of Interstate Engineering, provided the Office with a report indicating the contributing watershed to the Proj #63 inlet culvert, located in the NW1/4 Section 34, Nansen Township, is 28 acres. A motion was made by Mgr. Fahsholz and seconded by Mgr. Haugen not to assess the NW1/4NW1/4 Section 34, Nansen Township, until the drain is reassessed. Upon roll call vote, the motion carried unanimously. (RCWRD #20-035)

- **Proj #66A Watershed Study**

Before proceeding with discussion of Proj #66A, Secretary-Treasurer Zentgraf announced that on July 28, 2020, the Board conducted a conflict analysis regarding Chr. Friskop's interest in property in the Drain #66A assessment district. The Board agreed the potential impacts to Chr. Friskop's property, and his Mother's property Chr. Friskop farms, create a clear "direct and substantial personal ... interest" in the matter, and that his conflict should preclude him from voting regarding a proposed project. However, the Board also agreed Chr. Friskop understands that area better than any of the other Board Members and that he should still be allowed to participate in discussions regarding a project, just to provide context in light of his personal knowledge of the area. At the July 28, 2020 meeting, the Board declared that Chr. Friskop has a conflict in the matter under Section 44-04-22 and passed a motion to preclude Chr. Friskop from voting on matters related to Drain #66A.

Secretary-Treasurer Zentgraf next presented the Board with Interstate Engineering's scope of work and cost estimate proposal for the Proj #66A watershed study. Cost for the study is a not to exceed amount of \$22,500. A motion was made by Mgr. Burvee and seconded by Mgr. Moffet authorizing Interstate Engineering to proceed with the study as outlined in the scope of work. Upon roll call vote, the following Managers voted in favor of the motion: Haugen, Moffet, Burvee, and Fasholz. Mgr. Friskop abstained. The motion carried. (RCWRD #20-040)

- **Proj #72**

Mr. Johnson reported that he is still trying to connect with the FFA representative to discuss possible repair of erosion damage in the NW1/4 Section 12, Abercrombie West Township. (RCWRD #20-009)

- **Proj #72**

Mr. Johnson reported he and Mr. Bassingthwaite met with the sales representative from Subsurface, Inc, to discuss installation of liners inside some deteriorating culverts on Proj #72. Mr. Johnson is waiting for a quote from the company. (RCWRD #20-026)

- **Contractor Updates-** Mr. Johnson provided a brief update on projects contractors have completed and are currently working on.

North Dakota State Water Commission ("ND SWC") Meeting

Secretary-Treasurer Zentgraf reported on the ND SWC meeting held August 13th. All cost share requests were put on hold until October.

Red River Joint Water Resource District Meeting

Mgr. Haugen provided a report of the Red River Joint Water Resource Executive Board meeting held August 12th.

Antelope Township Board of Supervisors Complaint Against Mark Boyer for Ditching in the NW1/4 Section 4, Antelope Township

Before proceeding with the meeting with Mark Boyer and the Antelope Township Board of Supervisors, regarding Antelope Township Board's Complaint #20-033, against Mark Boyer, Secretary-Treasurer Zentgraf announced that on July 28, 2020, the Board conducted conflict analysis regarding Mgr. Haugen's family relationship with the Boyers, via his niece and his grandson, and that the Board passed a motion to preclude Mgr. Haugen from participating in discussion or participating in any votes regarding the Complaint.

Those requested by the RCWRB to attend the meeting and present were Mark Boyer and Antelope Township Board of Supervisors Ben Haberman, Ryan Johnson, and Joe Erbes. The District's attorney, Sean Fredricks, took part in the meeting via video conference. Joe Metcalf and Brian Boyer were also present.

Purpose for the meeting was to attempt to resolve the dispute over new ditching done without a permit in the NW1/4 Section 4, Antelope Township. The Township Board contends the ditch work has caused the road on the east side of the NE1/4 to wash out three times within the past year.

Mr. Fredricks explained the Board's statutory obligation in handling the complaint is to determine if the work which was done is new drainage and if so, if it involves a watershed of 80 acres or more. If the answers to these questions are yes, the Board has an obligation to order the ditch work closed or filled. Mr. Boyer could apply for a State surface drain permit, the Board could hold the Complaint in abeyance for Mr. Boyer and the Township Board to work through the dispute, or Mr. Boyer could close the ditches. Mr. Fredricks explained that if the Board's engineer determines the work involves new drainage of an 80 acre watershed or greater, Mr. Boyer will be responsible for all costs, including the cost of a state drainage permit.

Mr. Boyer asked for a definition of "the road washing out". He indicated water has gone over the road several times over the years. He proceeded to explain that he went to the NRCS Office, where he received the suggestion to flatten the slopes of the ditches and widen the bottom of the ditches, which is what he did, along with filling the washouts. Mr. Fredricks explained NRCS jurisdiction is federal swampbuster issues; Water Resource District jurisdiction is drainage. In addition to complying with federal swampbuster regulations, Mr. Boyer must comply with drainage regulations.

The Antelope Township Supervisors offered an alternative to Mr. Boyer for installing a ditch along the south side of the township road in the Township's right-of-way on the north side of Section 4 and installing a culvert in the NECR of the section. Mr. Boyer did not see the advantage of giving up farmland to create a road ditch for the water when the water can flow through the natural channel. It was explained to Mr. Boyer that he is farming within the Township's right-of-way.

Mr. Boyer suggested installing an additional culvert under the east township road to alleviate the issue of water topping the road and washing it out. Members of the RCWRB recommended the Township Supervisors and Mr. Boyer work together and hire an engineer to look at the issues and provide proper culvert sizing for an additional culvert through the township road. An engineer may also provide other solutions to reduce some of the flooding issues in this area. The Township Officers expressed concern with adding

another culvert through the road, as they are worried about downstream impacts. North Dakota Stream Crossing Standards were explained to the group and the Managers again suggested securing the services of an engineer. Mr. Boyer did not feel there would be downstream impacts by adding a culvert because the same amount of water would eventually go through the road with one culvert or two. The Township Supervisors disagreed, as adding a culvert would increase the flow of water that can go through the road at one time and could increase the erosion downstream.

The meeting concluded with a motion by Mgr. Moffet and seconded by Mgr. Burvee to hold the Complaint in abeyance to allow the Antelope Township Board of Supervisors and Mr. Boyer time to try to resolve the matter. Upon roll call vote, the following Managers voted in favor of the motion: Fahsholz, Moffet, Burvee, and Friskop. Mgr. Haugen abstained. The motion carried.

If the Township Board of Supervisors and Mr. Boyer do not reach an agreement, the RCWRD will be obligated to investigate the Complaint.

Adjournment

There being no further business to come before the Board, Chr. Friskop adjourned the meeting at 11:15 AM.

Respectfully submitted,
Monica Zentgraf
Monica Zentgraf
Secretary

Gary Friskop
Gary Friskop
Chairman of the Board